Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

INSTITUTO DE EDUCACION UNIVERSAL, CORP.; ANGEL RUIZ RIVERA; MERARIS SANTOS; CARLOS TOMAS SANABRIA; FERMINA SANTOS; DAVID ROGER-BURGOS; ISMAEL MARTINEZ-GALARZA

Petitioners

v.

UNITED STATES DEPARTMENT OF EDUCATION; RICHARD W. RILEY, Individually and as Secretary of U.S. Department of Education; JANE RILEY; CONJUGAL PARTNERSHIP RILEY-RILEY; DAVID LONGANECKER, Individually and as Assistant Secretary for Postsecondary Education; JANE LONGANECKER; CONJUGAL PARTNERSHIP LONGANECKER; JACK REYNOLDS, Individually and as Ex-Acting Director Institutional Participation Division; JANE REYNOLDS; CONJUGAL PARTNERSHIP REYNOLDS-REYNOLDS; DAVID MORGAN Individually and as Acting Director Compliance and Enforcement Division; JANE MORGAN; CONJUGAL PARTNERSHIP MORGAN-MORGAN; JUDITH WINSTON, Individually and as Director of General Counsel; JOHN DOE 96CV1893-1; CONJUGAL PARTNERSHIP DOE-WINSTON; MARIANNE PHELPS, Individually and as Director of Institutional, Participation and Oversight Service; JOHN DOE 96CV1893-2; CONJUGAL PARTNERSHIP DOE-PHELPS; EUGENE TOURNOUR, Individually and as Ex Regional Inspector General for audit; JANE TOURNOUR; CONJUGAL PARTNERSHIP TOURNOUR-TOURNOUR; BERNARD TADLEY, Individually and as Director of Regional Inspector General for Audit; JANE TADLEY; CONJUGAL PARTNERSHIP TADLEY-TADLEY; ANN MARIE CIMINO, Individually and as Director Student Financial Assistance, N. Y. Regional Office; JOHN DOE 96CV1893-3; CONJUGAL PARTNERSHIP DOE-CIMINO; ROBERT MCKIERNAN, Individually and as Chief Institutional Review Branch I Field Operation Service Student Financial Assistance; JANE

MCKIERNAN, CONJUGAL PARTNERSHIP MCKIERNAN-MCKIERNAN; BILL SWIFT, Individually and as Chief Branch II, JANE SWIFT; CONJUGAL PARTNERSHIP SWIFT-SWIFT

Respondents

Petition for a Writ of Certiorari of an Appeal to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED (Rule 14.1)(a)

1. Can a district judge get away from the mandates of 28 U.S.C. Sections 144 and 455, by simply refusing to rule on the Motion for his/her disqualification or recusal? See In re I.B.M., 687 F.2d 591:

> "This basic tenet of our legal system is a natural outgrowth of one of the Supreme Court's earliest holdings, that "it is emphatically, the province and duty of the judicial department, to say what the law is" Marbury v. Madison, 5 U.S. 137, 176 . . . However, **a court's power to determine its jurisdiction is surely not limitless; it, like all power, may be abused and usurped."**

2. Is not the district judge obliged to comply with his/her ministerial duties and rule upon the Motion, regardless of how he/she exerts its judicial discretion either by referring it or by ruling over it? In In re Kansas, 85 F3d 1353, a case where after ten (10) months of "full-blown" discovery allowance before the filing of recusal motion,(none in this), the Circuit recently stated: "**[t]he judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion"**. Implying thus, that the judge has a duty to rule.

3. Is not the Court of Appeals (CA) obliged, as part of its supervisory functions, to order a district court judge to rule upon his/her motion for disqualification or recusal? See Lewis v. Curtis, 671 F.2d 779, where it was admonished: "Impartiality and the appearance of impartiality in a judicial officer are sine qua non of the American legal system." In Commonwealth v. Continental, 393 U.S. 145, the Court stated:

> "(A)ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." **Without pausing to consider whether there is a basis for legal disqualification, we conclude that the undisputed facts dictate that the appearance of justice will be served only if the assignment to another judge is made, and we will, pursuant to our supervisory power, so direct."**

4. If the affidavit under section 144 timely filed and legally sufficient,

irrespective of its contents, does not the district judge has to recuse himself/herself? See In re Union Leader Corp , 292 F 2d 381. **"It is the affiant's, not the court's, view of the facts that is controlling.** Petitioner might file an entirely unexpected affidavit, sufficient on its face. If it did so, the court would have to accept it no matter how untruthful it considered its contents." See Berger v. U.S.,1921,255 U.S.,34.

5. If in a sui generis case such as the instant, where the district judge simply refused to rule upon the motion for his recusal, can the Circuit Court rule upon an nonexistent order, since there is no order to be appealed from; since there was no order, period? See In re Ford Motor Co , 110 F 3d 954, where the Third Circuit provides a dissertation about the standards behind 28 U.S.C. 1291 and the exceptions of Cohen v. Beneficial, 337 U.S. 541 and its progeny. In this recent opinion one is reminded that:

> "Although one might assume that collateral finality would be determined by a bright-line rule, the importance determination under the Court's jurisprudence is rather a function of a balancing process. See, e.g. Behrens v. Pelletier, U.S. 116 S. Ct. 834, 844 (Breyer dissenting) (canvassing recent collateral order jurisprudence and noting that the importance analysis is a balance of interests); Johnson, 115 S.Ct. at 2157, (Stating that in determining appealability a court must look to the competing considerations that underlie questions of finality, namely "the inconvenience and costs of piecemeal review on the one hand **and the danger of denying justice on the other"** (citations omitted)."

6. In case the Circuit of Appeals, in the exercise of its discretion, determines that an scenario such as this is not worthy of mandamus, even when the district court judge has ignored and as such bypassed and fooled the letter and the spirit of 28 U.S.C. 144 and 455, can the Circuit Court rule by dictum for the district judge who did not rule himself/herself ? See Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 where the Court clearly established that :" The Court of Appeals, after properly concluding that the District Court's order was not immediately appealable under section 1291, **erred in reaching the merits of the District Court's order."**

7. What purpose does the dictum of the CA have if the mandamus was denied, anyway, except for the consequential effect of prejudging a potential subsequent appeal? See concurrent opinion by Judge Winter of the Second Circuit in Apple v. Jewish Hospital, 829 F.2d 326, where he expressed, on occasion of a moot recusal: **"The discussion is therefore unnecessary dictum."**

8. In other words can the CA decide for the district judge in first instance, when he/she has not ruled yet or should the CA remand for resolution or refrain from ruling for the court of first instance that have refused to resolve? See Easley v. University of Michigan Board of Regents, 906 F.2d 1143, where the Sixth Circuit said:

> " The one issue not resolved in Easley is the plaintiff's appeal of the refusal of the district judge who tried the case, Honorable John Feinkins, to recuse himself. We declined to resolve that issue on the record before us when the district court's judgment was first appealed and **we remanded the matter with instructions to the district court to conduct a hearing, enlarge the record, and make specific findings of facts and conclusions of law related to the claim that Judge Feinkins abused his discretion in declining to recuse himself under the provisions of 28 U.S.C. sections 144 and 455**." (emphasis ours)

PARTIES TO THE PROCEEDINGS BELOW

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INSTITUTO DE EDUCACION UNIVERSAL, CORP., ANGEL RUIZ RIVERA, MERARIS SANTOS, CARLOS TOMAS SANABRIA, FERMINA SANTOS, DAVID ROGER-BURGOS, ISMAEL MARTINEZ-GALARZA

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v.

UNITED STATES DEPARTMENT OF EDUCATION, RICHARD W RILEY, Individually and as Secretary of US Dept of Education, JANE RILEY; CONJUGAL PARTNERSHIP RILEY-RILEY; DAVID LONGANECKER, Individually and as Assistant Secretary for Postsecondary Education; JANE LONGANECKER; CONJUGAL PARTNERSHIP LONGANECKER; JACK REYNOLDS, Individually and as Ex-Acting Director Institutional Participation Division, JANE REYNOLDS; CONJUGAL PARTNERSHIP REYNOLDS-REYNOLDS; DAVID MORGAN Individually and as Acting Director Compliance and Enforcement Division; JANE MORGAN; CONJUGAL PARTNERSHIP MORGAN-MORGAN, JUDITH WINSTON, Individually and as Director of General Counsel; JOHN DOE 96CV1893-1; CONJUGAL PARTNERSHIP DOE-WINSTON, MARIANNE PHELPS, Individually and as Director of Institutional, Participation and Oversight Service; JOHN DOE 96CV1893-2; CONJUGAL PARTNERSHIP DOE-PHELPS, EUGENE TOURNOUR, Individually and as Ex Regional Inspector General for audit, JANE TOURNOUR, CONJUGAL PARTNERSHIP TOURNOUR-TOURNOUR, BERNARD TADLEY, Individually and as Director of Regional Inspector General for Audit; JANE TADLEY; CONJUGAL PARTNERSHIP TADLEY-TADLEY; ANN MARIE CIMINO, Individually and as Director Student Financial Assistance, N. Y. Regional Office; JOHN DOE 96CV1893-3; CONJUGAL PARTNERSHIP DOE-CIMINO, ROBERT MCKIERNAN, Individually and as Chief Institutional Review Branch I Field Operation Service Student Financial Assistance; JANE MCKIERNAN; CONJUGAL PARTNERSHIP MCKIERNAN-MCKIERNAN; BILL SWIFT, Individually and as Chief Branch II,

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Respondents

Petition for a Writ of Certiorari of an Appeal to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Instituto de Educacion Universal, Corp., Angel Ruiz Rivera; Meraris Santos; Carlos Tomas Sanabria; Fermina Santos; David Roger-Burgos; Ismael Martinez-Galarza pray that the Court issue a writ of certiorari to review the judgment of the First Court of Appeals, in this case.

OPINIONS BELOW

This is an application for a Writ of Certiorari to be issued against the petition for reconsideration of a mandamus denial of the CA for the First Circuit in case 99-1544, orders of May 21, 1999 (Appendix A) and June 17, 1999 (Appendix B). This appeal is based on a Motion For Disqualification (MFD) filed on September 15, 1998, against Honorable District Court Judge Fuste in case 96-1893 (JAF). It is also based on complaints filed against him at the Judicial Council for the First Circuit on December and January 1999. On his denial, of February 11, 1999, Honorable Chief Judge Torruella, advised us that the mandamus was the most adequate mechanism for this sort of claim. (See this order by Chief Judge Torruella (Appendix C) after consolidating First and Second Complaint of Judicial Misconduct (CJM). A second Motion for Disqualification Nunc Pro Tunc (MDNPT) was filed on February, 19, 1999. Both Motions for Disqualification were ignored by the District Court Judge.

JURISDICTION (Rule 14 e)

(I) The order which review is petitioned was entered on May 21, 1999, and its Motion for Reconsideration on June 17, 1999 by the Honorable U.S. Court of Appeals for the First Circuit.
(iv) The Honorable U.S. Supreme Court has jurisdiction over this petition for certiorari pursuant to 28 U.S.C. 1254 and 2101(c).

APPLICABLE LAW (Rule 14 f)

First amendment of the Constitution, specifically the clause related to the right to petition the government for a redress of grievances. Fifth amendment of the Constitution, specifically the clause related to the right of citizens not to be deprived of life, liberty or property without due process of law. Seventh amendment of the Constitution, in what is relative to the right of trial by jury. Ninth amendment of the constitution in that the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people, such as the inalienable human right to defend oneself in a court of law. Fourteenth amendment in what is relative to the equal protection of the law. 28 U.S.C. section 1915 Proceedings in Forma Pauperis. Rule 24 of the Federal Rules of Appellate Procedure. Local Rule 303 of the U.S. District Court of P.R. 28 U.S.C. section 1654, Appearance personally or by counsel.

STATEMENT OF THE CASE (Rule 14g)

(ii) This is a petition for review of a judgment of the CA of the First Circuit, where the basis for jurisdiction in the court at first instance was the first, the fourth, fifth, ninth, and fourteenth amendments to the U.S. Constitution; 28 U.S.C.1331; 42 U.S.C. 1981, et seq., 20 U.S.C. 1070, and the authority of Bivens v. Six Unknown Narcotics Agents 403 U.S. 388.

1. On July 23, 1996, the plaintiffs, Instituto de Educacion Universal (IEU), a non-profit educational institution, its President, Angel Ruiz Rivera, (ARR) and others, filed a declaratory judgment and injunctive relief petition, together with a Bivens complaint for constitutional and

civil rights (42 U.S.C. 1981 et seq.) violations. Although two different, distinct resources were filed, they were both assigned docket number 96-1893 (JAF). The injunction was prejudged on September 18, 1996, (see Memorandum In Support of Motion for Disqualification (MFD) of September 15, 1998, pp 13-16, and Second complaint at the Judicial Council [SCJC] of January 18, 1999), before the time allowed by the own Judge to the parties to file dispositive motions. (See Motions for Reconsideration of September 30, Oct 17, 1996)

2. After the denial of the injunction, the two aforementioned motions for reconsideration were filed, praying that the judge amended evident mismanagement of justice, but to no avail. Afterwards, a long period of inactivity followed without the court providing for any discovery, *sans* calling for an initial scheduling conference, nor issuing a case management order, much less providing for a jury voir dire, and a trial by jury as the plaintiffs are constitutionally entitled to. On August 19, 1997, the judge entered his first "final" judgment of the Bivens complaint. The resignation of attorney Cerezo followed. A Notice of Appeal was then filed by the institution's President, pro se and in representation of the nonprofit educational institution on September 19,1997. On December 2, 1997, ARR filed the appeal brief pro se and in representation of IEU (97-2205)

3. On January 26, 1998, the CA dismissed it (Appendix D)for lack of a final judgment regarding "plaintiffs claims for damages". It invited, however, ARR to refile appeal when judgment was final. It then moved on February 12, 1998, for a Motion for Reconsideration and to inform that he was appearing pro se and in representation of IEU. No opposition was filed, and no denial was issued by the CA regarding appellant's representation of the non-profit educational institution.

4. On March 5, 1998, ARR filed also pro se and in representation of IEU, a Notice of Appeal of the final agency decision of the U.S. Department of Education (U.S.D.E.), asking for its judicial review (98-1242). Together with this Notice of Appeal, a Motion for Leave to Appear In Forma Pauperis (IFP) was filed by petitioner here. Such Motion was granted by the CA on March 27, 1998. (Appendix E) Eventually, on July 24, 1998 the CA transferred the case to the District

Court where it was later assigned 98-2225 (RLA).

5. Anticipating that Judge Fuste was not going to rule for the "plaintiffs claims for damages", as he had not even called for an initial scheduling conference nor issued a case management order ; since he had already given the government an ex-parte participation implicit in the August 15, 1996 order; since he had ruled against the injunctive relief petition before the time he had allowed the plaintiffs' lawyers at the time to file dispositive motions; since he had denied two motions for reconsideration (on October 9 and November 21, 1996, respectively) where he distorted the facts related to the dates he had himself written in his own handwriting and; since he had shown signs of pervasive bias in favor of the defendants (See MFD plus the complaints filed against him at the Judicial Council on December 1, 1998; January 18, 1999; and February 8, 1999); Angel Ruiz Rivera moved to file another IFP application for the rest of the proceedings related to this case. Such motion was filed on March 4, 1998. On March 9, 1998, it was denied without the reasons as prescribed by Rule 24 of the Rules of Appellate Procedure and the local rule 303.

6. It was this denial which provoked the filing of appeal 98-1660 by ARR to the Circuit Court, the Appeal of the IFP denial. It was docketed more than three months after, not before there were certain problems at the courts' Clerk Offices.

7. On March 5, 1998, Judge Fuste, took a Memorandum entitled "Appeal" that was intended to be an "Appeal Brief", and that had been filed together with the first Notice of Appeal, and treated it as a "motion for reconsideration"; denying it. ARR, promptly sent a Notice of Appeal of this denial insisting that it ratified the Judge Fuste's final disposition against the plaintiffs of the Bivens complaint. This appeal was docketed as 98-1607.

8. Contemporaneously, in another setting, although co-related, on March 25, 1998 ARR filed, again pro se and in representation of IEU, a complaint against Great Lakes Higher Education Corporation and others, that was assigned docket number 98-1300 (SEC). ARR also filed an IFP application. Such motion was granted on April 6, 1998. (Appendix F)

9. By June 1, 1998, the CA issued an order regarding 98-1607. Plaintiffs do not have record or recollection, nor it appears in the record of the District Court, nor the Circuit Court, that the docket fees for this appeal were ever paid. The petitioner was awaiting for the appeal 98-1660 to be resolved since it involved his IFP status in case 98-1893 (JAF), before paying or not the docket fees. In the interim, on June 29, 1998, the CA denied 98-1607 (Appendix G), and left the IFP appeal (98-1660) unresolved. Apparently, the CA chose to dismiss the 98-1607 appeal without collecting the docket fees, rather than deciding on the IFP appeal.

10. On June 8, 1998, the CA issued a Notice advising the lack of payment of the docket fees for appeal 98-1660, the IFP appeal. On August 5, 1998, it followed with a Notice of Default. Petitioner, ARR, then moved through an Informative Motion (entered on August 24, 1998) to question the requirement of a docket fee payment of an IFP application, since the appeal's objective in part was precisely the exemption of such payment. It was also argued that since the same District Court and own CA had granted ARR, the IFP status, ARR felt it was unjust for it to demand the payment of the docket fee which was part of what petitioner was entitled to and legally asking for. The claim was ignored and the CA followed with another order on August 26, 1998 giving me until September 9, 1998 to pay the fee. On September 1, 1998, the U.S. Attorney filed their appellees' brief in which they claimed that the IFP appeal was probably moot since the fee had been paid for 97-2205; and that for 98-1242, the CA had granted us the IFP status. (See appellee's brief at 4). The appellee's failed however to mention anything related to appeal 98-1607 for which the IFP application had been submitted.

11. Faced with no other alternative, on September 4, 1998, ARR paid the fees and informed the CA, through a Supplemental Informative Motion filed on September 9, 1998. On September 12, 1998, ARR received a Notice announcing the scheduling of oral argument for the week of November 2, 1998. On September 14, 1998, ARR received a letter by the Court announcing that the previous notice had been sent by error and that a new notice was to be sent at a later time. No such new notice was ever sent.

12. Since twice, the CA had dismissed our appeals for lack of a final

judgment on the "plaintiffs claims for damages" (January 26, 1998 and June 29, 1998 in cases 97-2205 and 98-1607, respectively), regarding case 96-1893 (JAF), the original course of action, ARR consequently filed on August 18, 1998 a Motion for Final Judgement, so that the judgment could be appealable. On September 15, 1998, ARR followed with the MFD of the District Court Judge, and another Motion In Opposition to Defendant's Motion Requesting Amendment Nunc Pro Tunc and Request to Revoke Summary Judgment and Permission to Amend the Complaint. On October 9, 1998, ARR proceeded with a Motion to Submit the Rest of the New Evidence Obtained based on the fact that ARR had obtained access to information regarding the dismissal of the Office of the Inspector General (OIG) auditor in charge (AIC) of IEU's audit (R. Nater). In the record of the proceedings at the U.S. Merit System Protection Board where the administrative law judge evaluated the claims of the expelled auditor, overwhelming, irrefutable and beyond doubt evidence emerged, exonerating IEU from the slanderous OIG findings used to viciously destroy it and its community. The evidence is transparent from the Quality Assurance Review (QAR) Team Report of the own USDE' OIG. See pages 4-22 of said Motion of October 9, 1998.

13. On December 15, 1998, ARR filed a Motion to Substitute a Party, since the student/graduate/employee/co-plaintiff, David Roger Burgos had died. David was a spina bifida disabled graduate of IEU, that worked at IEU, and represented the class of the graduates of the institution. On December 17, ARR filed a Motion For Default Judgment and to compel Defendant's to Comply with Discovery.

14. On January 26, 1999, the Judge Fuste consummated his deprivation of the plaintiffs' rights to discovery, trial by jury; in sum, of due process and justice, by issuing his newest version of the final judgment of case 96-1893 (JAF). All this, without having resolved the MFD filed since September 15, 1998. Regarding this inaction and omission of his ministerial duties, ARR filed the MFDNPT with a logical petition that the judgment be vacated until this is resolved. ARR moved for Mandamus and since it was denied on May 21, 1999, and its reconsideration on June 17, 1999, ARR is hereby filing a petition for certiorari regarding this issue. Contradictorily, Judge Fuste, granted us our motion to amend the complaint, simultaneously, with his final judgment nunc pro tunc. To

exacerbate his pervasive bias, he did not allow us to file this granted motion to amend complaint and in a totally contradictory manner, ratified his sua sponte summary judgment.

15. Judge Fuste's denial of our IFP application, in view of the granting of same by another same district court judge, and by the same and own CA, simply cannot be justified.

16. For the Chief Judge of the Circuit Court to have determined that our third complaint, based on the Judge Fuste's denial of our IFP status was frivolous, in view of the fact that the own Court that he presides had granted this same Motion, is clearly contradictory. By the time he issued his decision on this third complaint, the CA had not yet decided on appeal 98-1660 which dealt specifically with the same identical issue. As a matter of deference to the Honorable Judge Torruella, ARR mentioned this fact in a Motion to Submit Additional Evidence of March 29, 1999 (Of 98-1660 at pp.5,6) This was done, very respectfully, to forewarn the CA of the awkward and peculiar contradiction of its Chief Judge, having resolved as frivolous a complaint against the District Judge Fuste's denial of the same Motion that the own CA he presides, had granted, denial which in turn, was awaiting appeal by the own Court he presides.

17. On April 21, 1999, the CA denied the IFP Appeal and it did not admit the new evidence that ARR submitted within the same Motion. Among the evidence submitted there were letters by the U.S. Department of the Treasury, collecting more than 29 million dollars from ARR. Said letters included intimidating language such as " A very aggressive legal collection action will be initiated against you". Another relevant evidence was a copy of the public deed of the payment in kind of ARR's mother's (70 years old) house which was given to a creditor for lack of payment of a loan to help offset the costs of IEU's plight against the defendants. Instead of weighing this evidence, the CA followed with a denial on May 4, 1999 claiming that the appeal had already been denied, even when the evidence was submitted prior to such decision.

18. On May 5, 1999, the plaintiffs filed a Petition for a Writ of Mandamus to the CA requesting them to order Fuste to comply with his

ministerial duty and to rule upon the motions for his disqualification. On May 21, 1999, it was denied, and its motion for reconsideration was also denied on June 17, 1999.

19. This petition for certiorari follows.

DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT
(Rule 14 h)

In the recent case, In re Hatcher, 150 F.3d 631, at 637,38, we find :

> ". . . **the denial of a motion for recusal under sec. 455 (a) may be challenged only by asking for a writ of mandamus prior to trial**. (Citations)"
>
> In Hook, we explained that sec. 455 (a) "**asks whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits. This is an objective inquiry**". Id.
>
> **So although the court tries to make an external reference to the reasonable person, it is essential to hold in mind that these outside observers are less inclined to credit judge's impartiality and mental discipline than the judiciary itself will be. (citations) (. . . "[W]hat matters[under section 455(a)] is not the reality of bias or prejudice but its appearance.")** (citations)

In the even more recent case In Re: U.S.A., 98-1765, the First Circuit quoted In re United States, 666 F 2d. 690,694, when it repeated that: **"courts must not only be, but must seem to be, free of bias or prejudice"**.

In the instant case, the record is crystal clear. The judge issued a show cause order which inherently and obligatorily implied ex-parte active participation of the government lawyers. (August 15, 1996- See MFD at pp. 2-10). (See In re Edgar, 96-2641, 7/18/96, where the Seventh Circuit removed the judge for violating 455 (b)(1), which provides that a judge

must "disqualify himself in the following circumstances: (1) **Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."** Also, the Circuit reminded us that Canon 3a(4) of the Code of Conduct for U. S. Judges provides:

> "**A judge should...except as authorized by law, neither initiate nor consider ex-parte communications on the merits, or procedures affecting the merits, of a pending or impending proceeding**."

And continuing with In Re Edgar, supra, we find: "Did any meeting between judge and experts touch the merits, or procedures affecting the merits? **We cannot know, because the district judge has blocked discovery from other participants**..."-(just as in the instant case). This is precisely what judge Fuste demonstrated when he issued his August 15, 1996 show cause order prejudging the issues in his opinion, even when the U.S.D.E. had not even appeared in the case, and consequently had not pleaded, averred, alleged or raised any defense whatsoever. This being the case, logical inference indicates that the judge must have had access or acquired "personal knowledge of disputed evidentiary facts concerning the proceeding" the only way through which he could had done it-through an ex-parte communication with the lawyers of the defendants.

The judge prejudged the injunction before the time limit he himself had allowed the plaintiffs to file their dispositive motions. (September 18, 1996-See MFD at pp.13-21). See In re School Asbestos Litigation, supra, where the Third Circuit admonished: **"District courts are entitled to broad deference regardless timeliness restrictions, but they are entitled to that deference only if they state those deadlines explicitly."** He then, on August 19, 1997 railroaded the plaintiffs with a sua sponte summary judgment without providing for an iota of discovery. See MFD at pp. 22-35. See also the recent decision of May 4, 1998 of the Court, in Crawford-El v. Britton, 96-1827, where guidelines are established for the handling of discovery and we are reminded that:

> **"Of, course, the judge should give priority to discovery concerning issues that bear upon the qualified immunity defense, such as actions that the official actually took, since that defense**

should be resolved as early as possible. (Citation)

He granted the co-defendants in their personal capacities an unsolicited absolute immunity even when they did not even appear in the case. See Motions for Default Judgement of February 18, 1998; December 17, 1998. See Stathos v. Bowden, 728 F.2d 15, where the First Circuit established:

> **"If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."**

In the instant case the federal officers knew that the clock hour regulation was clear and that their purported interpretation had been rejected by all authorities at the U.S.D.E. including the Secretary - See Memorandum of September 18, 1996, at 34-43 and October 8, 1998 Motion at 4-8. See also Lac Du Flambeau v. Stop Treaty, 991 F.2d 1249, where the Seventh Circuit advised that:

> **" We refuse to fall victim of the maxim that "hard facts made bad law", however, and believe well-established principles governing the dispositions of motions for summary judgment require that STA and Crist be allowed a trial to demonstrate the sincerity of their assertions of an absence of racial motivation"**- (in the instant case applying contrariu sensu).

He ignored the overwhelming, beyond doubt and irrefutable and undisputed evidence in favor of the plaintiffs that emerged from the government own documents, such as the U.S.D.E.'s own Quality Assurance Review (QAR), Team Report and the own Secretary's final agency decision, ratified by the Secretary after petitions for reconsideration of his own Office of the General Counsel (OGC) Acting Director and his own Office of Inspector General (OIG) Counsel. (See [MDNPT] of February 19, 1999 at pp. 44-52). See U.S.A.v. Kelly, 88-8727, 9/29/89, where the Eleventh Circuit advised us that :

> **"Sufficiency of the evidence is a question of law subject to de novo review by this Court. We owe no special deference to the district**

court on this issue". (Citation)

He failed to comply with his ministerial duty by not deciding on his motion for recusal nor referring it (See MDNPT at pp. 76-77). He granted a summary judgment that was never moved for by the defendants (See MDNPT at pp. 70-75), where they did not comply also with the "anti-ferreting" rule, and thus did not file the separate statement of uncontested facts required by the local rules (of whose committee he is the chairperson and for which he chastised the plaintiffs!!). See MDNPT at pp. 42-46. Finally he granted a motion to amend the complaint while not allowing for its filing and simultaneously and contradictorily granting a final judgement nunc pro tunc, against the plaintiffs (See MDNPT at pp. 52-63). (See Lewis V. Curtis, supra, where the Third Circuit determined that "**because it was error for the district court not to permit Lewis to file his amended complaint, we will not consider whether the original complaint complied with Rule 23.1**". Further on it elaborated:

> **"Neither the district court nor the defendants have identified any material errors or irregularities in the averments of the complaint. Without evidence that the allegations are without foundation, the district court's finding that the original complaint was not verified is an abuse of discretion. Likewise, the refusal to permit the legally sufficient amended complaint to be filed is an abuse of discretion.")**

See also Oropallo v. Parrish, 23 F 3d 394, where the First Circuit determined:

> **"In light of appellant's pro se status, and because the district court did not address this claim, we think the dismissal should be modified to be without prejudice to the plaintiff's filing a second amended complaint realleging this claim.")**

In the process, he denied the plaintiffs of their constitutional right to a trial by jury, of discovery, and of a day in court. Further, he never, called for an Initial Scheduling Conference, nor issued a Case Management Order, thereby revealing his undisguised conviction and commitment not to allow the plaintiffs a day in court.

In the same case quoted above, the First Circuit reminded us of In Re Martinez-Catala, 129 F.3d 213,217., where they repeated that "**It is only in unusual situations that interlocutory review of a judge's recusal to step aside is available through mandamus.**" May respectfully ask: can you come up with a more unusual situation than this in the contemporary federal judiciary?

The Circuit, reminds us that an applicant for the writ **"must show both that there is a clear entitlement to the relief requested, and that irreparable harm will likely occur if the writ is withheld."** In re Cargill, 66 F.3d at 1260. May we respectfully comment that in the instant case the irreparable harm is not likely to occur, it is unjustly and unfortunately a *fait accompli*. The institution and the co-plaintiffs were all destroyed first by the actions of the defendants and second by the actions and inactions of the judiciary in this case which were supposed to cure the injustice of the former.

In terms of the "clear entitlement", the Circuit reminds us that

"In the run-of-the-mill recusal case, "mandamus is almost always withheld-we do not say always-unless the petitioner demonstrates that it is 'clearly' entitled to relief". In re Martinez-Catala, supra, at 218

In other words, "mandamus requires a case not merely close but clearly over it". Id. At 221. Very respectfully, petitioner's feel first, that this is not your typical run-of-the-mill recusal case. Like the own Circuit stated later (on p.6 of 21)." Typically, cases implicating section 455(a) are fact-specific, and thus sui-generis." On this extreme petitioner cannot agree more. This is what petitioner has been crying out loud since the onset, that this is a sui generis case in many respects. In brief our theory behind this petition can be summarized as follows:

1. Our first contention is that judicial disqualification can be based on intra judicially acquired information, specially in a case like the instant one where there has been usurpation of power (IFP denial and ignorance of recusal), and entrenched favoritism for the defendants.

In Mount v.U.S.A., 91-1425, the First Circuit, per curiam, established

that:"unlike that under 455(b)(1) or section 144, **disqualification under 455(a) can be based on judicially-acquired information**.(emphasis ours) (citations)

Moreover, in Liteky v. United States, 114 S.Ct. 1147, Justice Scalia wrote:

> "**and they will do so if they reveal such a high degree of favoritism or antagonism that would make fair judgment impossible**".(emphasis ours)

At any rate, almost forty years ago, the First Circuit, In re Union Leader corp., 292 F.2d 381, we were advanced that,

- "**The second possible level of the petitioner's claim, and the one on which we understand it to rely, is not that an attack on a judge per se disqualifies him, but that in this case the judge's "[fairly]" supports**" (See Berger v. United States, 1921, 251, U.S.22,23.

2. Our second contention is that in cases where the district court judge simply refuses to comply with his/her ministerial duty and upon the recusal motion, the CA has two options, or it recuses by way of mandamus or remand ordering the judge to rule upon the recusal motion . In the case Easley v. University of Michigan Board of Regents, supra, the

Sixth Circuit said:

> ". . . **we remanded the matter with instructions to the district court to a hearing, enlarge the record, and make specific findings of facts and conclusions of law related to the claim that Judge Feinkins abused his discretion in declining to recuse himself under the provisions of 28 U.S.C. sections 144 and 455**."(emphasis ours)

In the case Hall v. Maynard, 91-7110 (10th.Cir.), the Tenth Circuit determined in a case similar to the instant case, except that on this one, the district judge at least complied with his ministerial duty and denied the motion whether it was an abuse of discretion or not. Let us see.

> "**Plaintiff argues that the district court judge erred in failing to rule on the motion for recusal and disqualification before proceeding to decide the case. Section 144 requires that when the affidavit of personal bias or prejudice is filed against a judge, he or she must cease to act in the case and proceed to determine the legal sufficiency of the affidavit.** Bell v. Chandler, 569 F.2d 556,559. **We therefore conclude that the district court erred in striking the motion for recusal and disqualification without first determining its legal sufficiency. Because this court cannot determine whether the district court would have granted the motion had it ruled, we partially remand the case for the sole purpose of permitting the district court to determine the legal sufficiency of the motion. The district court shall set forth its reasons for its decision on the motion**. See Hinman v. Rogers, 831 F. 2d 937, 938-40 (10th.Cir.1987) (considerations in ruling on motion for recusal and disqualification). We retain jurisdiction on the appeal and will dispose of it after the district court acts on remand. See Easley v. University of Michigan Bd. Of Regents, 853 F. 2d 1351,1358 (6th Cir. 1988) (appellate court retains jurisdiction of appeal and remands the case to district court for further ruling on motion for disqualification of judge).

In this case, the litigant, a prisoner, found more justice than us in the instant case since even when his mandamus petition was denied, at least the CA remanded for a ruling which is the least that the letter and the spirit of sections 144 and 455 deserve. Interestingly enough, the case used as precedent (Easley) is one in which the litigant was accused of plagiarism while in law school. Without taking anything from these litigants, the issues at stake here are extremely more relevant, since in the instant case 5,000 students lost their studies, 500 employees their jobs and a 16 years old non-profit educational institution was viciously destroyed.

In the case Aronson v. Brown, 14 F.3d. 1578, the Federal Circuit remanded a case to the Court of Veteran Appeals for review of a Judge Ever's decision. In this decision, the Circuit reminded us that:

> "**The standard now is objective.(footnotes omitted). The powerful national interest in a impartial judiciary is reflected in this**

> **amendment of section 455, for removal of the subjective standard shifts emphasis to the appearance as well as the fact of impartiality**."

In Liljeberg, 486 U.S. at 860, the Court stressed the importance of avoiding all appearance of impropriety, in promoting "public confidence in the integrity of the judicial process". (Citations)

And may petitioner respectfully ask, if the standard is objective and the judge has failed to on his own recusal, is it legally right for the CA to rule for the judge, or should the judge be obliged to comply with his/her ministerial duties and to rule for him/her self on his/her own recusal or disqualification?

3. Our third contention is that most of the Circuit Courts of Appeals have established that mandamus is the recourse when the motions for disqualification are denied and that appeals of such denials are not final orders, thus, unappealable.

In the case Holsey v. Shives, 920 F.2d 926,, the Fourth Circuit determined that:

> "It is well established that the denial of a motion to disqualify is not a final order or one that should be treated as such under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) (and other citations) ...Because the district court's ruling on the motion on the instant case was not a final order under 28 U.S.C. 1291 or an order presented to this court under 28 U.S.C.1292(b), (Citation), the appeal should be dismissed. Parties aggrieved by the trial court's refusal to order disqualification are not wholly without an interlocutory remedy. **In the exceptional case, where the issue of disqualification appears to be a significant one, the court may consider the motion to disqualify by way of a petition for a writ of mandamus** .(Citation)

In the case Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop-Treaty Abuse-Wisconsin, Inc., supra, the Seventh Circuit told us:

> ". . . **is well-established that a party moving for disqualification under section 455(a) must immediately move for a writ of mandamus in the event the district judge denies the motion**.(Citation)"

In the case In re Francis Harrigan, 9 F.3d 112,, the Seventh Circuit said:

> **"When a judge denies a motion to disqualify himself under section 455(a), the moving party's sole recourse is to apply to this court immediately for a writ of mandamus**." (Citation)

In the case Davidson v. Brown, 5 F.3d 535, the Ninth Circuit, told us:

"The denial of a motion to disqualify a district court judge is not an appealable final order under 28 U.S.C. 1291.(Citation)

In the case Nichols v. Alley, supra,, the Tenth Circuit advised us that: **"An order denying a motion to recuse is interlocutory and is, not immediately appealable**. (Citations)

In the case In re Antar, 71 F.3d 97, the Third Circuit conceded:

> ". . . **it is settled law of this circuit that mandamus "is a proper means for this court to review a district court's refusal to recuse from a case pursuant to 28 U.S.C. Section(s) 455(a)**". (Citations).

In the instant case, because of the sui generis condition of a lack of order, the unappealability is even stronger and clearer. Simply stated, if a denial order of a recusal is not appealable, the lack of an order should be even less appealable. If the lack of order then is unappealable, the only remedy the plaintiffs have regarding the judge's inaction or non-ruling is the mandamus. Thus, if the judge eventually denies the recusal, then, ex post facto, that order would be appealable eventually when the final judgment appeal is finally ruled upon.

4. Our fourth contention is that there is discrepancy among the Circuits in terms of the standard of review of disqualification motions and if the recusal orders are interlocutory or not.

In the case Hook v. McDade, 89 F 3d 350, 7/9/96, the Seventh Circuit took the mandamus petition of Hook regarding the refusal to recuse by judge McDade as a review de novo. In footnote 3 of this decision we find

> "We note that the Fifth and the Second Circuits review disqualification motions for an abuse of discretion". See In re Billedeaux, 972 F 2d 104,106 (5th Cir 1992), In re Drexel Burham Lambert Inc., 861 F.2d 1307,1312-13 (2nd Cir1988).[1]

However, dissenting opinions in both cases argue that the abuse of discretion standard is inappropriate for allegations of judicial bias Billedeaux, supra at 106-107 (De Moss, dissenting). Burnham, supra, at 1321 (Lumbard, J., dissenting).

In the case In Re U S A., supra, in its dissident opinion Judge

Torruella stated at the onset

> "Although judicial discipline requires that I bow to circuit precedent, and I do, **I believe that the precedent relied upon by the majority, to the effect that review of Chief Judge Cerezo's refusal to recuse herself is subject to appellate review only for abuse of discretion, runs contrary to both the letter and spirit of section 455(a). This provision leaves no discretion to the judge if he or she comes within its purview."**
>
> **I can detect nothing discretionary or unequivocal in this language. To the contrary, this is a directive that allows for no deviation.; The judge must recuse him or herself if his or her impartiality might reasonably be questioned."**(emphasis in the

---

[1] In Drexel, supra, the Second Circuit affirmed "Moreover, we have held that the standard for review of a judge's refusal to recuse himself **is not an abuse of discretion standard."**

original)

Then in a footnote, he adds:

> **"I concur with the Seventh Circuit that the question whether the evidence presented under section 455(a) requires disqualification is a question of law, which should be reviewed on appeal de novo.(citations) I further agree with that Court that [d]rawing all inferences favorable to the honesty and care of the judge whose conduct has been questioned[,as our present circuit standard does,] could collapse the appearance of impropriety standard under section 455 (a) into a demand of proof of actual impropriety.(citations)"**

Thus, as we can see the Circuit judges and consequently, the Circuits do not seem to agree in terms of the standard of review of the appeals or petitions for mandamus of denials of recusals or disqualifications by the own district court judges against whom those motions were filed.

The Third Circuit, for example, in the recent case In re Ford Motor Co., 110 F3d. 954, explained their position regarding this issue:

> "**The practical difference between appellate jurisdiction and mandamus jurisdiction is the standard of review. Our standard for review under appellate jurisdiction is plenary; our standard for review under mandamus jurisdiction is for a clear error of law. (Citation)**

In the case In re Moix-Nutt, 97-6075, the Eighth Circuit tell us that: "**A majority of courts treat recusal orders as interlocutory.**" **(Citations)** But it adds further on:

> **". . . while we would deny the appellant the leave to appeal, we are persuaded that the unique procedural posture of this case warrants immediate judicial review. If we postpone appellate review until the entry of a final order, we risk tainting the entire course of judicial proceedings."**

They end up by affirming that "the standard of review on appeal from a recusal order is abuse of discretion." (Citation). Since petitioner is not a lawyer, I shall not dare to express ourselves in terms of these legal technical matters; where, undoubtedly, there is discrepancy among the experts. Nevertheless, and, irregardless if the standard is de novo, or abuse of discretion, and if the non-recusal is interlocutory or final, because it does not have to do with the merits of the case, the plain truth is that a judge cannot be allowed to bypass sections 144 and 455, by simply ignoring his/her recusal motion. The allowance by the CA of the usurpation of power of Judge Fuste, by not ordering him to, at least, rule on the recusal, constitutes a shameful endorsement of highly reproachable conduct.

5. Our contention that the district court's actions and inactions in this case deserve disqualification by way of mandamus because the constitutional right of the plaintiffs to a trial by jury was predeprivated by the judge, one of the logical effects of his non-recusal.

Almost 40 years ago, in the case In re Union Leader, 292 F.2d 381, the First Circuit established clearly that

> **"Mandamus has been held to be an appropriate remedy to secure the right to jury trial, at least where the right is clear,(citations)...Although there are difference of opinion, we agree ...that public confidence in the courts may require that such a question be disposed at the earliest opportunity."**

More recently, in Lytle v. Household Manufacturing, 494 U.S. 54, the Court established clearly that:

> ". . . **the right to jury trial on the legal claim, including all issues common to all claims remain intact.**(Citation)"

Much more recently, in May 24, 1999, in City of Monterey v. Del Monte, 97-1235, pp. 30-32, the Court said, referring to the Seventh Amendment:

> "That amendment applies not only to common-law causes of action but also to statutory causes of action analogous to common-law causes of action ordinarily decided in English law courts in the late

> 18th Century, as opposed to those customarily heard by courts of equity or admiralty." (p.17)

And it continued to stress that:

> **"As often is true in section 1983 actions, the disputed questions were whether the government had denied a constitutional right in acting outside the bounds of its authority, and, if so, the extent of any resulting damages. These were questions for the jury."**

The district court in this case, not only predeprived us of our constitutional right to a trial by jury, but the fact that it did not even provide, not even for discovery, unmasks the pervasive bias, and the evident intentions of not providing us of a trial.

CLOSING ARGUMENT

In U.S.A. v. Cowden, 545 F.2d 257, the First Circuit stated:

> **"The proper test, it has been held, is whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself, or even necessarily in the mind of the litigant filing the motion...,but rather in the mind of a reasonable man.** (Citations)

The plaintiffs are convinced, and have no doubt whatsoever that a reasonable person knowing all the pertinent circumstances, shall question Judge Fuste's ability to be impartial in this case. The consistent and pervasive bias of the Judge Fuste as manifested by his appearance of lack of impartiality, in favor of the appellee's; warrants an nunc pro tunc unqualified disqualification of the Judge.

> **"We need not decide whether any of these facts alone would have required disqualification, . . . together they create an appearance of partiality that mandates disqualification".** See In re School Asbestos Litigation, 977 F.2d 764

In its recent decision in Tramonte V. Chrysler Corp., 136 F.3d 1025, the Court determined that

> **"Yet Judge Lemmon was under the duty to police her disqualification status. The Honorable Judge has a duty to be watchful of such disqualifying circumstances and decide any requests to recuse with disclosure necessary to the decision made clear upon the record."**

In re Moix-Nutt, supra, the Eighth Circuit admonished: **"If we postpone appellate review until the entry of a final order, we risk tainting the entire course of judicial proceedings."**

In re Drexel Burham Lambert Inc., supra, the Second Circuit affirmed:

> **"On the contrary, we have repeatedly held that mandamus is appropriate in recusal motions, believing that there are "few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself".** (Citations)

See also In re United States, supra, ("**public confidence in the courts require that questions of disqualification must be disposed of at the earliest possible opportunity).**"

In, In re Pearson, 990 F. 2d 653, the First Circuit reminded us that: **"Such writs (mandamus) afford a mechanism for immediate correction of acts or omissions amounting to an "usurpation of power".** (Citation)
In Parker v. Sill, 989 F.2d 500, the Sixth Circuit explained:

> **"After plaintiff's petition for a writ of mandamus seeking to vacate the district court order was denied by the district court and appealed to this court, this court held that the petition for a writ should be treated as an appeal of the district court's order".**

Clearly, this and other precedents, where the mandamus of a recusal denial is treated as an appeal raises the question as to why shall the CA procrastinate with this recusal. Later it reminded us that: "Courts have consistently held that the challenged judges ruled on the motion and that a

judge must "proceed no further" only if the affidavit is "timely and sufficient". (Citations)

In summary, given the evidence previously submitted, and herein enclosed, recusal of the Judge is in order and the correct thing to do.

> "When the issue of disqualification is raised prior to trial (as it has been in this case), a **call in close cases should lean toward recusal as a matter of efficient judicial administration because the final decision making stage of the litigation is thereby insulated from the waste and inefficiency which would result from a later determination** . . ." See In re Billedeaux, 972 F 2d 104,106

Thus, for all the above stated reasons, the petitioner, humbly pray that:

1) You order the Circuit Court to recuse the district judge and consequently vacate his judgment and provide for a fair trial,

2) In the alternative, order Judge Fuste to comply with his ministerial duty and thereby rule upon his motions for recusal not before allowing for discovery and a hearing, which is the least that petitioner is entitled to.
So I state, allege and pray.

Respectfully submitted,

Angel Ruiz Rivera
Pro Se
P.O. Box 191209, San Juan, P.R.00919-1209.
787-766-2915 ; 766-3205 Fax

APPENDICES

APPENDIX A

(Filed May 21, 1999)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 99-1544

ANGEL RUIZ RIVERA; INSTITUTO DE
EDUCACION UNIVERSAL, INC.,

Petitioners

Torruella, Chief Judge,
Campbell, Senior Circuit Judge,
and Lynch, Circuit Judge

JUDGMENT

Upon careful review of the petition for a writ of mandamus, we are not persuaded to grant extraordinary relief.

Petitioners do not have a clear and indisputable entitlement to relief, and we do not find that equitable factors or risk of irreparable harm weigh in their favor. See In re Martinez-Catala, 129 F. 3d 213, 217 - 18 (1st Cir. 1997). Particularly, in the context of this mandamus review, we cannot say that the judge clearly and indisputably was required to recuse. The judge's various substantive and procedural rulings and non-rulings, however unsatisfactory to petitioners, do not exhibit a predisposition or bias "so extreme as to display clear inability to render fair judgment." See Liteky v. United States, 510 U.S. 540, 551 (1994). In stating that conclusion, we intend no comment on the merits or propriety of the rulings and non-rulings.

that presumably being the subject of petitioners' pending appeal from the final judgment.

Further, in light of that final judgment and the pending appeal, not to mention petitioners' mandamus proceedings in the district court, we find no compelling reason to remand the matter for additional rulings at this point or otherwise to act outside the normal course of appellate review.

The petition for writ of mandamus is denied.

By the Court:

PHOEBE D. MORSE, Clerk

By: _____
Chief Deputy Clerk

APPENDIX B

(Filed June 17, 1999)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 99-1544

ANGEL RUIZ RIVERA, INSTITUTO DE
EDUCACION UNIVERSAL, INC.,

Petitioners

Torruella, Chief Judge,
Campbell, Senior Circuit Judge,
and Lynch, Circuit Judge

ORDER OF COURT

The petition for reconsideration of mandamus denial is denied.

By the Court

PHOEBE MORSE

Clerk

APPENDIX C

CIRCUIT COUNCIL
FOR THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 260

Before
Torruella, Chief Judge

ORDER
Entered February 11, 1999

Complainant, a civil litigant, filed a complaint of misconduct under 28 U.S.C. § 372(c) against a district judge in the First Circuit on December 1, 1998. Complainant filed a second complaint relating to the same matter on January 18, 1999, which has been consolidated with the first. Complainant alleges that the judge violated 28 U.S.C. § 372(c) while presiding over a civil action in which complainant was a plaintiff. Complainant originally alleged that the judge engaged in conduct prejudicial to the effective and expeditious administration of justice by improperly dismissing complainant's emergency motion for a temporary restraining order, by allegedly engaging in ex parte communications with defendants, and by delaying a decision on a motion for recusal. In his second complaint, complainant alleges that the judge improperly dismissed complainant's motion for a preliminary injunction and improperly denied complainant's two motions for reconsideration of that dismissal.

Complainant claims that the judge improperly dismissed complainant's emergency motion for a temporary restraining order, preliminary injunction motion and two motions for reconsideration of the denial of the preliminary injunction motion. These claim (sic) are not

cognizable under the misconduct statute as they are directly related to the merits of a decision or procedural ruling. See 28 U.S.C. 372(C)(3)(a)(ii). Further, complainant states that information included in the judge's order dismissing the temporary restraining order could only have been obtained from the defendants', thereby establishing that an ex parte communication must have taken place. This allegation is not substantiated and should therefore be dismissed as frivolous. See 28 U.S.C. 372(c)(3)(A)(iii). Complainant further alleges that the judge deliberately misled the plaintiffs with respect to filing deadlines because he had determined his ruling prior to evaluating all of plaintiffs' arguments. Complainant does not substantiate this claim. (Indeed, complainant states that he "does not have evidence that (the judge) has a personal bias or animus against (him).") this claim should therefore be dismissed as frivolous. See 28 U.S.C. 372(c)(3)(A)(iii). Finally, complainant alleges that the judge engaged in misconduct by unnecessarily prolonging his decision on a motion for recusal. The assertion that the judge's delay in deciding complainant's motion constitutes judicial misconduct is governed by Rule 1(e) of the Rules of the First Circuit Judicial Council Governing Complaints of Misconduct or Disability.

Rule 1(e) provides, in part:

> (T)he Complaint procedure may not be used to force a ruling on a particular motion or other matter that has been before the judge or magistrate too long. A petition for mandamus can sometimes be used for that purpose.

Therefore, the allegation relating to the judge's undue delay is not cognizable under the Act. The complaint is therefore dismissed as directly related to the merits of a decision or procedural ruling, 28 U.S.C. 372(c)(3)(A)(iii), and as 28 U.S.C. 372(c)(3)(A)(iii).

/s/ Torruella
Chief Judge

APPENDIX D

(Filed January 26, 1999)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-2205

INSTITUTO DE EDUCACION UNIVERSAL CORP., ET AL.,
Plaintiffs, Appellees,

v.

UNITED STATES DEPARTMENT OF EDUCATION, ET AL.,
Defendants, Appellees.

ANGEL RUIZ-RIVERA,
Appellant.

Before

Boudin, Stahl and Lynch,
Circuit Judges.

ORDER OF COURT

Defendants moved for summary judgment with respect to some, but not all, of plaintiffs' claims, and the district court granted defendants' motion. Appellant Ruiz-Rivera has not appealed from that grant, and

defendants have moved to dismiss for lack of jurisdiction. Because the district court has not yet acted on plaintiffs' claims for damages, no final judgment resolving all claims against all parties has yet entered. Appellant has not responded to defendants' motion to dismiss and has not presented any basis on which the interlocutory order would be immediately appealable. Consequently, this appeal is dismissed for lack of jurisdiction. Once the district court has entered judgement on all of plaintiffs' claims, then appellant may file a new notice of appeal, and the judgment entered on August 19, 1997 will be ripe for appellate review.

By the Court:

PHOEBE MORSE

Clerk

APPENDIX E

(Filed March 27, 1998)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1242

ANGEL RUIZ RIVERA AND INSTITUTO
DE EDUCACION UNIVERSAL, INC.
Petitioners,

v.

U.S. DEPARTMENT OF EDUCATION
AND RICHARD RILEY, SECRETARY,
Respondents

ORDER OF COURT

The motion of Angel Ruiz Rivera to proceed in forma pauperis is granted.

By the Court:

PHOEBE MORSE
Clerk

(cc: Messrs. Ruiz Rivera, Pierce and Office of General Counsel)

APPENDIX F

IN THE UNTIED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Instituto de Educacion Universal,
and Angel Ruiz Rivera
v.
Great Lakes Higher Education,
and Unknown Insurance Company

MOTION TO PROCEED IN FORMA PAUPERIS

I, the above-named petitioner declare under penalty of perjury that I am the petitioner in the above-entitled proceeding; that I am unable to pay the costs of said proceeding or give security thereof; that I believe I am entitled to redress; and that I believe I have a meritorious case.

Wherefore, I hereby request to be allowed to proceed in forma pauperis, without prepayment of fees, costs or security thereof.

Date: _____ Petitioner: _____

ORDER

This motion is hereby GRANTED.

At San Juan, Puerto Rico, this 6th day of April of 1998.

S. E. CASELLAS
UNITED STATES DISTRICT JUDGE

APPENDIX G

(Filed June 29, 1998)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1607

INSTITUTO DE EDUCACION UNIVERSAL, CORP.,
ANGEL RUIZ RIVERA
Plaintiffs, Appellants

v.

U.S. DEPARTMENT OF EDUCATION, ET AL.,
Defendants, Appellees

Before

Selya, Circuit Judge,
Campbell, Senior Circuit Judge,
and Lynch, Circuit Judge.

ORDER OF COURT

As pointed out in our January 26, 1998 order dismising appeal number 97-2205, appellants' claims for damages have not yet been ruled upon. We do not regard the district court's March 5, 1998 margin order denying appellants' September 19, 1997 motion for reconsideration as a refusal to rule upon the damages claims because the motion for

reconsideration did not plainly point out that the damages claims were outstanding and ask for a ruling on them. As all of appellant's claims were outstanding and ask for a ruling on them. As all of appellant's claims have not been adjudicated, we dismiss appellants' appeal from the March 5, 1998 margin order for lack of appellate jurisdiction.

Appeal dismissed.

By the Court:

Clerk

cc: Messr Ruiz Rivera, Ms Munoz Acosta, Ms Biddle & Univeral (sic) Corp

Certified Copy of Clerk, U.S. District Court of Puerto Rico